Supreme Court, U.S.
FILED
FEB 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-490

McDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

PERCY GREEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

and

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief *amicus curiae* in the present case.[1] In support of this motion, the Chamber states as follows:

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1. Pursuant to Rule 42(2) of the Rules of this Court, the Chamber requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for respondent gave such consent. Counsel for the petitioner, however, declined to consent.

1. The Chamber is a federation with a membership of more than 3,700 state and local chambers of commerce and trade associations, and an underlying membership of more than five million businessmen and business firms. It is the largest association of business and professional organizations in the United States.

2. The basic issue involved in this case—the prohibitions imposed by Title VII of the Civil Rights Act of 1964 in a nondiscriminatory employment situation—is a matter of significant national concern. In *Griggs* v. *Duke Power Company*, 401 U. S. 424, 431 (1971), this Court held that Title VII necessitated "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." In the instant case, however, such Congressional intent has been seriously perverted. Title VII has been applied to an isolated refusal to hire which neither operates invidiously against those protected by the Act nor involves arbitrary or unnecessary job qualifications. The result is that, contrary to the objectives of Title VII, the Court of Appeals has required that the Company extend a discriminatory preference to certain groups; that it provide a black employee, as stated by the dissent, not merely with "the same opportunity as a white, but . . . one of a different and greater degree." App. to Pet., p. A37. This unprecedented interpretation of the law, the Chamber believes, will vitiate, rather than foster, the cause of eliminating employment discrimination.

3. The interest of the Chamber, accordingly, is based on the dangerous and far-reaching consequence that af-

firmance of the decision below will have for American industry. It is for this reason that the Chamber respectfully submits its views.[2]

Respectfully submitted,

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2. The Chamber submitted a brief, and participated in the oral argument, as an *amicus*, in *Griggs*. It also recently submitted *amicus* briefs in two important Title VII cases now pending before the Fifth Circuit *en banc: Huff* v. *N. D. Cass Company*, No. 71-2342, and *E. E. O. C.* v. *H. Kessler and Company*, No. 71-1082.

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This brief is filed on behalf of The Chamber of Commerce of the United States of America contingent upon the Court's granting the annexed motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE.

The interest of the Chamber is set forth in the annexed motion for leave to file a brief *amicus curiae.*

ARGUMENT

I.

The Court Below Misinterpreted *Griggs* v. Duke Power Company, 401 U. S. 424 (1971).

The crux of *Griggs* is that when an employer disqualifies those persons protected by the Act at a substantially higher rate than other individuals, and his conduct has no significant relationship to the employment in question, such conduct then constitutes forbidden employment discrimination. In the instant case, however, neither of these two critical prerequisites of *Griggs* are present. Accordingly, as under analogous provisions of the National Labor Relations Act, 29 U. S. C. § 151, *et seq.*, management is free to effectuate any employment act it chooses; it may, for example, take personnel action "for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not [take such action] when the real motivating purpose is to do that which [the Act] forbids."[1]

A. As counsel for the petitioners in *Griggs* acknowledged, an employer's conduct may not be found discriminatory "merely because it disadvantages an individual black in some isolated situation. A practice should be found discriminatory only where it *consistently* and *systematically* prefers whites over blacks."[2] The personnel action must, in other words, operate as "a serious

1. See, e.g., *Ft. Smith Broadcasting Co.* v. *N. L. R. B.*, 341 F. 2d 874 (8th Cir. 1965); *N. L. R. B.* v. *McGahey*, 233 F. 2d 406, 412-413 (6th Cir. 1956); and *Tims* v. *Board of Education, et al.*, 452 F. 2d 551 (8th Cir. 1971).

2. Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1671 (1969) (Emphasis added).

barrier" to minority employment; if there is no such barrier, the case "need be subjected to little, if any, examination under fair employment laws."[3] Indeed, in a colloquy during the oral argument in *Griggs* between Mr. Chief Justice Burger and counsel for Griggs, counsel admitted that "the key to [his] case" was that the employment act there at issue "disproportionately screen[ed] out members of a particular race or national group." It was recognized that, if the *Griggs* hiring requirements had been applied in a situation where there was a virtual all-white population, there would have been no violation of the Act.[4] In sum, as *Griggs* itself teaches, the "consequences of [the] employment practices" in question must operate as "built-in headwinds" to the equal employment opportunities of minority groups. 401 U. S. at 432.

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3. Brief for the petitioner in *Griggs* at n. 18 and p. 30.

4. Transcript of oral argument in *Griggs* at pp. 15-17:

Q. [Mr. Chief Justice Burger] Well would it be a violation of the act if an employer had a general policy that he would not hire anyone, in any capacity if they didn't meet certain potential promotibility qualifications?

A. [Mr. Jack Greenberg for Petitioner Griggs] That would not be a violation of the job if he could demonstrate that that kind of a capacity is necessary to do the job. And necessary for the operation of his plant. It then might not be a violation either if it did not disproportionately screen out members of a protected race or national group or—

Q. Well now that's the key to—

A. That's the key.

Q. To your case, isn't it?

A. That's the key. • • •

Q. Then if a power plant in let us say the state of Maine on the assumption that there would be an almost all white population there, if a power plant in the state of Maine had a high school or other aptitude test that was directed at promotibility, and it did not have any adverse impact on any racial group or national origin group, it would not be—

A. That would be an industrial problem. I would suggest that they might be depriving themselves of people who could do the job very well, but that would not be the problem—

Q. No violation problem?

A. No violation problem. • • •

The decision below disregarded this essential *Griggs* prerequisite. There was no evidence introduced in this case to show that blacks as a class engaged in unlawful demonstrations against prospective employers in a greater proportion than any other racial group. Consequently, the Company's isolated act of disqualifying, regardless of his group identity, a particular applicant for employment who engaged in such activities had no inherently discriminatory impact upon the classes protected by the Act. This is a critical deficiency. Where, as, in the instant case, there is no "serious barrier" to minority employment, an employer cannot be denied the right to continue utilizing any employment standard he chooses, even though it may be based on "subjective" considerations.[5]

B. Apart from the absence of any serious racial barrier, the conduct here at issue was also clearly justified by legitimate business considerations. Certain conduct, it is submitted, is so inimical to the Act's purposes that employees should be deprived of the Act's protection regardless of any possible impact of the employer's conduct on affected groups. This fundamental principle of industrial jurisprudence is ingrained in decisions under the analogous provisions of the Labor Act. It is similarly applicable in the instant case.

In one of the first Labor Act cases, for example, this Court rejected the view that the statute protected those persons who sought through unprotected means to accomplish legitimate ends. As this Court stated in *N. L.*

5. As in analogous situations under the Labor Act, there is here no "inherently destructive" impact on a protected group but, rather, only a "comparatively slight" harm which requires an affirmative showing of improper motivation. Since petitioner's refusal to hire Green was concededly not so motivated, there was no unlawful discrimination. Cf., e.g., *N. L. R. B.* v. *Great Dane Trailers*, 388 U. S. 26 (1967); *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963); and *American Ship Building Co.* v. *N. L. R. B.*, 380 U. S. 300 (1965).

R. B. v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939), the right of employees to protest employment conditions gives them no license to engage in "unlawful acts to force compliance with [their] demands." Employees are not insulated from disciplining merely because their conduct occurs in the context of a labor dispute or in response to their employer's unfair labor practices; to do so "would . . . put a premium on resort to force instead of legal remedies and . . . subvert the principles of law and order which lie at the foundations of society." *Id.* at 253. See, to the same effect, those decisions uniformly upholding the right of an employer to discharge or refuse employment to persons who either unlawfully interfere with the employer's property rights (e.g., *N. L. R. B.* v. *Clinchfield Coal Corp.*, 145 F. 2d 66 (4th Cir. 1944)), obstruct egress or ingress to the employer's premises (e.g., *N. L. R. B.* v. *Perfect Circle Co.*, 162 F. 2d 566 (7th Cir. 1947)) or otherwise engage in acts of misconduct which damage the business or reputation of the employer (e.g., *N. L. R. B.* v. *Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503 (2nd Cir. 1942); and *Hoover Co.* v. *N. L. R. B.*, 191 F. 2d 380 (6th Cir. 1951)). The rationale of such decisions, as this Court has emphasized, is that to "require an employer finance . . . activities" which undermine "industrial plant discipline and loyalty" is fundamentally inconsistent with the national labor policy of "promoting industrial peace and stability." *N. L. R. B.* v. *Electrical Workers*, 346 U. S. 464, 476 (1953).[6] A similar criterion,

6. Thus, under the Labor Act, the initial inquiry in determing whether a violation has been committed is to ascertain whether the activities involved are "protected" by the Act. If "unprotected," there is no violation even if such activities are peaceful and lawful. See Cox, *The Right To Engage in Concerted Activities*, 26 Ind. L. J. 319 (1951). Even where found to be "protected," moreover, the activity may lose such protection where it is accompanied by serious, albeit lawful, acts of misconduct. See, e.g., *N. L. R. B.* v. *Electrical Workers*, 346 U. S. 464 (1953). Indeed, where an employee violates the Labor Act, dis-

it should be noted, is also well-established in industrial jurisprudence.[7]

This standard should likewise prevail under Title VII. That Act, like the Labor Act, also seeks the peaceful resolution of disputes. It is for this reason that persons offended by conduct alleged to be unlawful under Title VII are afforded a wide arsenal of legal weapons to redress their grievances.[8] They are also specifically guaranteed, under Sec. 704(a) of the Act, absolute protection against reprisals where they express, *by lawful means*, opposition to practices "made unlawful" under Title VII; a protection which even extends to the filing of false or baseless

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ciplinary action against him will be upheld even where the employee's conduct has been provoked by the employer's own severe unfair labor practices. See, e.g., *National Packing Co.* v. *N. L. R. B.*, 352 F. 2d 482, 485 (10th Cir. 1965).

7. The serious acts of misconduct committed by Green in the instant case, for example, would deprive him of employment rights even under "just cause" standard applied by arbitrators. See, e.g., *Kirkhill Rubber Company*, 65-2 ARB 8440 (production "slowdown"); *The Cooper Hospital*, 65-2 ARB 8703 (picket line misconduct); and *Harvey Aluminum, Inc.*, 66-2 ARB 8546 (strike misconduct). Such decisions represent, of course, an important "instrument of federal labor policy." *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970).

8. In addition to private suits, Title VII, as recently amended, also authorizes the E. E. O. C. to institute federal court actions on behalf of individuals or classes allegedly aggrieved and additionally permits, in appropriate cases, the entry of temporary injunctive relief pending final disposition of a case. Equal Employment Opportunity Act of 1974, Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1974), Sec. 706(e), and (f)(1) and (2). These expanded rights supplement existing relief available under the post Civil-War civil rights statutes (see, e.g., *Jones* v. *Mayer*, 392 U. S. 402, 409 (1968)), Attorney General "pattern and practice" actions (See Sec. 707(c) of 1972 Act) and other federal laws, executive orders, contractual provisions, and state fair employment statutes. See, e.g., *Truck Drivers and Helpers, Local 568* v. *NLRB*, 379 F. 2d 137 (D. C. Cir., 1967); *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Rios* v. *Reynolds Metal Co.*, ... F. 2d ....., 5 FEP Cases (5th Cir. 1972); and Executive Order 11246, 3 C. F. R. § 402 (1970).

charges with the Commission. *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (5th Cir. 1969). The underlying purpose of the Act is thus "to protect the employee who utilizes the tool[s] provided by Congress to protect his rights." *Id.* at 1005. There was no intent, any more than under the Labor Act, to channel allegations of employment discrimination away from the established legal machinery into "stall-ins", "sit-ins" or similarly unprotected activities. The decision below, if affirmed by this Court, would, however, have precisely that result.

II.

The Decision Below Creates a Required Preference for Classes Covered by the Act.

Title VII does not "command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs*, 401 U. S. at 431. Such a requirement would, as this Court recognized in *Griggs*, fly in the face of the Act's anti-preferential provisions forbidding an employer from showing "discriminatory preference for any group, minority or majority . . ." *Ibid.* The decision below, however, disregards this basic principle.

Under the Court of Appeals' view, an employer is required to have one rule for minority applicants—they may not be disqualified from employment for engaging in unlawful actions against their prospective employer—and a different one for non-minority persons who admittedly would not have been hired for engaging in similar conduct. Where, as in this case, there is no showing that such inconsistent treatment is required either to remove discriminatory employment barriers or to rectify past misconduct, such reverse discrimination cannot be justified. In Title VII, Congress sought only "to aid minority

employment within the constraints of color blindness and non-interference with employer decisions that are based on legitimate business considerations.'" It went no further, and expressly omitted from the Act any mandatory minority-aiding quota systems. It is precisely such a forbidden quota which, nonetheless, will result from the decision below.

The Chamber submits that, consistent with the purposes of the Act and *Griggs*, personnel action should be found discriminatory only where: (1) overt discriminatory intent is established; (2) the inherent effect of such conduct is discriminatory as, for example, the employment tests and educational job requisites involved in *Griggs;* or (3) the employer retaliates employment practice is used to retaliate against activities protected by the Act. In the present case, none of these three conditions have been met.

9. Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1166 (1971).

CONCLUSION

For the reasons stated herein, as well as those presented by the petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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